

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANTIQUE WORLD, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1988 :
through August 31, 1991. :

In the Matter of the Petition :
of :
DONALD A. ALESSI :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1989 :
through August 31, 1991. :

DETERMINATION
DTA NOS. 811565,
811566 AND
811567

In the Matter of the Petition :
of :
LOUIS A. BERRAFATO :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1989 :
through August 31, 1991. :

Petitioner Antique World, Inc., 10995 Main Street, Clarence, New York 14031-1701,
filed a petition for revision of a determination or for refund of sales and use taxes under Articles
28 and 29 of the Tax Law for the period December 1, 1988 through August 31, 1991.

Petitioner Donald A. Alessi, 4940 Hillcrest, Clarence, New York 14031-1602, filed a
petition for revision of a determination or for refund of sales and use taxes under Articles 28 and
29 of the Tax Law for the period March 1, 1989 through August 31, 1991.

Petitioner Louis A. Berrafato, 8981 Cliffside Drive, Clarence, New York 14031-1406, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1989 through August 31, 1991.

A consolidated hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on June 16, 1994 at 2:15 P.M. Petitioners appeared by Donald A. Alessi, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioners filed a brief on October 7, 1994. The Division of Taxation filed a brief on November 16, 1994, two days after the date for filing its brief had expired. By letter dated November 29, 1994, petitioners requested that the brief of the Division of Taxation be returned since it was filed late.¹ By letter dated December 1, 1994, the Division of Taxation stated its position that the late filing of its brief did not "provide a sufficient basis for striking the Division's brief." The brief of the Division of Taxation was returned with a cover letter dated December 1, 1994. This began the six-month statutory period for the issuance of a determination.

ISSUES

I. Whether admissions fees collected by petitioners were subject to sales tax under Tax Law § 1105(f)(1).

II. Whether the Division of Taxation was warranted in using an indirect audit method to estimate petitioners' admissions sales for the audit period.

III. Whether, if an indirect audit was warranted, the audit method used was reasonably calculated to determine the tax due.

IV. Whether, if the audit method was reasonable, petitioner established that the results of the

¹Petitioners noted in their letter that the Administrative Law Judge made the following statement at hearing: "If you file a document or file a brief, and it's not in accordance with the schedule, and you haven't asked for time to file a brief late, I'm going to return the brief to you."

audit were erroneous.

V. Whether petitioners have established that any failure to comply with the sales tax law was due to reasonable cause and not to willful neglect.

FINDINGS OF FACT

The Division of Taxation (the "Division") issued to petitioner Antique World, Inc. a Notice of Determination dated March 12, 1992 assessing sales taxes in the amount of \$52,552.37 for the period December 1, 1988 through August 31, 1991, plus penalty and interest. Notices of determination dated March 23, 1992 were issued to petitioners Donald A. Alessi and Louis A. Berrafato assessing tax in the amount of \$52,527.76, for the period March 1, 1989 through August 31, 1991, plus penalty and interest, against them individually, as officers of Antique World, Inc.

The notices of determination were issued as a result of a field audit of the business operations of Antique World which operates a flea market. The grounds where the flea market is held have open fields which are used for parking, an outdoor area where vendors display items for sale and buildings which are also used for sales and displays. It generates revenues from several areas. According to the Field Audit Report prepared by the auditor, the principal product or service of Antique World is the rental of real property. This is the space it rents to vendors on the grounds of the flea market. It also rents tables to vendors and receives income from this activity. During most of the audit period, Antique World rented facilities to vendors who operated food concessions on the premises; however, in 1991 Antique World operated the concession sales itself. Finally, Antique World operated special events several times per year and collected admission fees for these events.

The auditor testified that she contacted "the taxpayer" (tr., p. 12) and made a request for books and records and set up an audit appointment. There is little evidence about this first contact in either the audit report or the auditor's testimony, so it is not known whether the first request for books and records was made orally or in writing. Apparently, the auditor's only personal contact was with Katy Toth, the office manager of Antique World. There is some

confusion in the record concerning the books and records made available. The auditor testified that the following books and records were provided:

"The sales journals, sales invoices, cash register tapes, New York sales tax returns, federal and state income tax returns, general ledgers, attendance records, which would include admissions revenues, depreciation schedules." (Tr., p. 12.)

After consulting the audit report, she testified that the 1988 and 1989 Federal and State income tax returns, attendance records, sales invoices and general ledgers were not made available (tr., p. 13). The audit report indicates that cash register tapes pertaining to concession sales, purchase invoices and a list of vendors with sales tax identification numbers for each vendor were made available. The auditor also testified that sales journals were provided (tr., p. 18).

According to the audit report, petitioners' purchase records were adequate and a detailed audit was conducted of those records. This resulted in an assessment of \$1,187.57 for recurring purchases on which no sales tax was collected or paid. The auditor reviewed cash register tapes for the period in which Antique World operated its own concession stands. She determined that sales tax was properly collected and remitted on these sales, with the exception of a few days when Antique World first took charge of these operations. Sales tax due in this area was determined to be \$164.80. Petitioners did not challenge these audit results.

The auditor noted in her report that petitioners rented tables to vendors for \$2.00 each and collected and remitted sales tax on these charges. Her worksheets indicate that she transcribed sales receipts on table rentals from petitioners' records. No tax was assessed on these charges.

The major area of contention between petitioners and the Division is an assessment of \$51,200.00 on admission charges. The auditor testified, and the audit report states, that she made numerous requests for records of admission fees collected during the audit period and was not provided with them. Apparently, those requests were made to Katy Toth who was not an officer of the corporation and did not have a power of attorney to represent Antique World on audit. Regarding a power of attorney, the Field Audit Report states: "A properly completed

Power of Attorney has not been filed because: . . . Contact with the taxpayer's representative was not necessary."

The auditor characterized Antique World as an "exhibit ground", and she considered entrance fees collected for the special events sponsored by Antique World to be subject to the sales tax imposed on admission charges to or for places of amusement. Because records of admission charges were not provided, the auditor estimated these charges using Antique World advertising brochures. Two brochures were available to the auditor. The first is for Antique World Expo, an event held on May 18 and May 19. The auditor identified this as a 1990 brochure. As pertinent, it contains the following statements:

"ANTIQUE WORLD & MARKETPLACE!

Open Every Sunday Year Round

Hundreds of Dealers set up both Indoor and Outdoors. Offering Antiques & Collectibles including Furniture, Jewelry, Clothing, Toys, etc., New Merchandise and much more.

Hours: 9 a.m. to 5 p.m.

No Admission / Free Parking

ANTIQUE WORLD AUTO!

June 22 & 23

Antique World AUTO is a swapmeet, Fleamarket and Car Show held annually. Over 200 cars are exhibited along with participating car part Dealers from most regions of the U.S. The Show is highlighted by the 50' [sic] & 60's Cruise-N-Dance held Friday at 8 p.m. June 22. Hours: Fri. 12 p.m. to 8 p.m. and Sat. 7 a.m. to 6 p.m.

Admission \$3.00 per person

* * *

ANTIQUE WORLD EXPO!

August 24 & 25

Antique World EXPO has earned the reputation for being one of the finest Antique & Collectible Shows in the Northeast. Featuring 600 Dealers from 22 U.S. States and Canada. The Show attracts over 20,000 people, and is held twice annually.

Hours: Fri. 9 a.m. to 7 p.m. and Sat. 9 a.m. to 5 p.m.

Admission: \$3.00 per person"

A second brochure used by the auditor is for Antique World & Marketplace, described as an indoor/outdoor market. The auditor identified this as a 1991 brochure. It contains two paragraphs describing activities and events as follows:

"Antique World & Marketplace is WNY's Largest Market. Just a pleasant country drive 15 miles east of Buffalo and 40 miles west of Rochester on Main St.

(Rt. 5) in Clarence (Erie County's oldest Est. Town). Once you arrive you will be pleased to find hundreds of indoor/outdoor Dealers featuring Antiques, Collectibles, Jewelry, New Merchandise, Entertainment, Produce & more. Food Concessions and Restrooms and [sic] conveniently located. This is a must stop for bargain hunters and Antique Enthusiasts.

* * *

-SPECIAL EVENTS

"Antique World Expo has earned the reputation for being one of the premier Antique & Collectible Shows in the Northeast. Featuring 600 Dealers from 22 U.S. States & Canada. The Show attracts over 20,000 people, twice annually, every May and August.

"Antique World's Arts & Crafts Shows -- Antique World sponsors three shows annually. The Shows include hundreds of the areas finest Artisans & Craftsmen. Live entertainment as well as many interesting demonstrations are offered to people of all ages."

Based on these brochures, the auditor assumed that there were 20,000 attendees at each special event held by Antique World. According to the brochure, the Antique World Expo was held twice per year and charged an admission fee of \$3.00. Thus, the auditor estimated that 40,000 persons attended this event each year from which petitioners received admissions revenue of \$120,000.00 per year or \$360,000.00 for the audit period.

Antique World Auto show was held annually. Assuming attendance of 20,000 persons per event, the auditor calculated admission charges of \$60,000.00 from the auto show in 1989 and 1990. She did not include the auto show in her calculations for 1991. Total revenues from Antique World Auto for the audit period were determined to be \$120,000.00.

The 1991 brochure states that the Arts & Crafts Fair was held three times per year. Petitioners charged an admission fee of \$2.00 for this event. The auditor estimated revenues from this event of \$40,000.00 for the sales tax quarter ending August 31, 1989; \$40,000 for the quarter ending August 31, 1990; \$40,000.00 for the quarter ending May 31, 1991; and \$40,000.00 for the quarter ending August 31, 1991. Thus, the auditor calculated total revenues from this event of \$160,000.00.

In her workpapers, the auditor stated: "1 [arts and crafts show] was assumed to have occurred in Q/E 11/91 which is outside the audit period." It is not known why the auditor assumed that only one arts and craft show was held in 1989 and one in 1990, when the 1991

brochure indicates that three shows were held annually.

The auditor determined that admission charges for the audit period totalled \$640,000.00 with a tax due on that amount of \$51,200.00.

Petitioner presented the testimony of Frank Berrafato, general manager of Antique World. He described the operation as a flea market where buyers and sellers come to transact business. The Antique Expo and the arts and craft fair were operated in much the same manner as the Sunday flea market except that an admission fee was charged. Mr. Berrafato testified that the auto show was held for two years running and then discontinued because the response to it was poor.

Mr. Berrafato estimated that an average of between 3,000 and 4,000 persons attended the Antique Expo and the arts and craft fair each time one was held. He thought that no more than 1,000 persons attended the auto shows.

Mr. Berrafato testified that Antique World's accountant advised that admission charges to the special events were not subject to sales tax. For this reason, Antique World did not maintain a separate record of admission charges. He asserted that approximately 80 percent of Antique World's income was from the rental of space to vendors. Receipts from space rental and admission charges were recorded together as nontaxable revenues.

Mr. Berrafato and Katy Toth prepared a breakdown of revenues received for the special events for each year in the audit period. Apparently rent and other income was subtracted from total income to determine admission charges. The schedule prepared by Mr. Berrafato shows admission charges as follows:

	<u>1989</u>	<u>1990</u>	<u>1991</u>
Expo (spring)	\$ 8,943.64	\$12,099.75	\$11,033.57
Expo (fall)	19,237.00	13,484.50	18,255.60
Craft show	5,605.97	4,194.36	3,780.00
Car show	<u>3,578.11</u>	<u>2,201.00</u>	<u> </u>
Totals:	\$37,364.72	\$31,979.61	\$33,069.17

Petitioners did not report income from real property rentals or from admissions as gross sales on its sales tax returns. Income from concession sales and table rentals was reported as

taxable sales.

CONCLUSIONS OF LAW

A. It is petitioners' position that its admission fees to special events were not subject to sales tax.

Tax Law § 1105(f)(1) imposes the sales tax on "[a]ny admission charge where such admission charge is . . . to or for the use of any place of amusement in the state" Tax Law § 1101(d)(2) defines "admission charge" as used in section 1105(f)(1) as an "amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor." A "place of amusement" is defined as "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101[d][10]). In its regulations, the Division includes within the definition of a place of amusement a "fairground or exhibition hall or grounds" (20 NYCRR 527.10[b][3]). Petitioners argue that the Antique Expos, arts and crafts fairs and auto shows were in fact flea markets which brought together buyers and sellers and, as such, were not places of amusement. They assert that Antique World would have had to provide entertainment, such as musical bands or travelling jugglers, in order for the special events to fall within the purview of the taxing statute.

The statutory definition plainly includes within its ambit the admission receipts derived from fees charged to attend the Antique World special events. The critical words in the statute are "place of amusement" and this term is expansively defined by the statute and the regulations (see, Matter of 1605 Bookstore v. Tax Appeals Tribunal, 83 NY2d 240, 609 NYS2d 144, cert denied ___ US ___, 130 L Ed 2d 19). A privately operated museum has been found to be a place of amusement (Matter of Fort William Henry Corp. v. State Tax Commn., 52 AD2d 664, 381 NYS2d 907) as well as an observatory located in a tall building (Matter of Wien v. Murphy, 28 AD2d 222, 284 NYS2d 303). Although the evidence presented by both parties was sparse, it is clear that people attended the special events to view the wares exhibited by vendors, perhaps to purchase an item and perhaps not, in effect, to shop. Surely, shopping, browsing and scrutinizing a vendor's goods are forms of amusement and entertainment. Musical bands or

other forms of live entertainment were not required.

B. Petitioners next claim that there was no rational basis for the Division's assessment. It is their position that the factor used to estimate admission fees, 20,000 attendees per event, was totally arbitrary and irrational.

It is well established that the Division may use an external index to determine taxable sales when books and records made available on audit are so insufficient as to make it "virtually impossible to verify taxable sales receipts and conduct a complete audit" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43; Tax Law § 1138[a][1]).

To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the complete audit period (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from these records, whether they are adequate for the purpose of verifying the taxpayer's sales tax liability (Matter of Chartair, Inc. v. State Tax Commn., supra). The Division cannot simply ignore a taxpayer's records and use an indirect method of estimating tax due if the taxpayer's records are readily available and provide an adequate basis on which to determine the amount of tax due (Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859; Matter of Chartair, Inc. v. State Tax Commn., supra). If the taxpayer's books and records do not provide an adequate basis for determining the tax liability, the Division must select an audit method which results in a reasonable calculation of the taxpayer's sales tax liability (Matter of W. T. Grant Company v. Joseph, 2 NY2d 207, 159 NYS2d 150, 157, cert denied 355 US 869). When the Division follows this procedure, the burden of proof is on the taxpayer to show that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 859, 446 NYS2d 451, 453); however, if it is shown that the Division's audit methodology is fundamentally flawed, the taxpayer need not prove that the result produced by that methodology is different from that which a detailed examination would have produced (Matter of Babylon

Milk & Cream Co. v. Bragalini, 5 AD2d 712, 169 NYS2d 124, 126, affd 5 NY2d 736, 177 NYS2d 717; see also, Matter of Adamides v. Chu, supra; Matter of King Crab Rest. v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978, 980).

C. Under the circumstances of this case, a two-step inquiry is necessary to determine whether the audit was reasonable. The first question to be asked is whether the auditor reasonably concluded that adequate records of admissions charges would not be made available. This is a critical question because the resort to an external index is only justified where records are requested and not produced (Matter of Todaro, Tax Appeals Tribunal, July 25, 1991). The second question is whether the audit method selected was reasonably calculated to reflect the tax due.

The evidence at hearing established without any question that petitioners did not maintain adequate records of admission receipts. They conceded this much. However, in determining whether the auditor reasonably concluded that such records would not be made available, it is necessary to view the events at the time the audit took place and before the assessment was issued (Matter of Queens Discount Appliances, Tax Appeals Tribunal, December 30, 1993). The inquiry is clouded in this case by two facts: (1) there is no evidence in the record of any written communication from the auditor to petitioners requesting books and records and (2) the auditor communicated only with Katy Toth, petitioners' office manager, and never asked for or received a power of attorney, apparently deeming it unnecessary to communicate either with petitioners directly or with an individual appointed to represent them. Nonetheless, I conclude that the auditor's determination that records of admissions would not be provided was reasonable under all of the circumstances. First, Katy Toth provided the auditor with other books and records requested, indicating that she was in a position to act for petitioners in such matters. Second, the auditor testified that she made numerous phone calls in an attempt to gain access to the records of admission fees, establishing that her request for such records was more than "weak and casual" (Matter of Christ Cella v. State Tax Commn., supra; Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992) and also establishing that petitioners had the

opportunity to supply the requested records and failed to do so. Finally, petitioners never alleged that Ms. Toth lacked the authority to communicate with the Division concerning this audit, in effect conceding that she had that authority (compare, Matter of Robert DeFilippis Crane Service, Tax Appeals Tribunal, June 9, 1994 [where the Tax Appeals Tribunal found that petitioners had subsequently ratified representation by an individual named in an improperly executed power of attorney]).

I now turn to the second question: whether the audit method was reasonably calculated to reflect the tax due. I agree with the Division that it was. Again, the rationality of the audit method must be determined in light of the information available to the auditor at the time of the audit (Matter of Queens Discount Appliances, supra). Although the auditor's testimony was somewhat confusing regarding the records made available, it is clear that records of admission revenues were not made available at the time of the audit. Admittedly, there were flaws in the audit method. The 1990 brochure indicates that the Antique Expo "attracts 20,000 people", but it is vague about whether this means 20,000 people annually or 20,000 people per event. The brochure makes no claims about the number of persons attending the auto show or the arts & crafts fair leading one to suspect that fewer people attended these events than attended the Antique Expo. One also suspects that the number of attendees claimed for the Antique World Expo was inflated to build interest in the event. Nonetheless, the auditor was not required to be precise or to select the most accurate method of estimating the tax liability; she was only required to fashion a rational methodology (Matter of Shukry v. Tax Appeals Tribunal, 184 AD2d 874, 585 NYS2d 531). The advertising brochures were, after all, about petitioners' business and contained information directly related to the question of admission fees. I cannot find that the use of those brochures to estimate admission revenues was irrational or arbitrary.

D. Where the Division uses a reasonable audit method, the burden of proof is placed on petitioner to show that the results of the audit are incorrect (Matter of Surface Line Operators Fraternal Org. v. Tully, supra). Petitioners have established that the audit results in this case greatly overstated the amount of admission fees collected during the audit period. Mr. Berrafato

credibly testified about the nature of the business and the number of people who attended the special events. The schedule he presented was prepared from petitioners' books and records. Inasmuch as the other records audited by the Division were found to be accurate, there is no basis for rejecting Mr. Berrafato's calculation of admission fees. The Division is directed to recalculate the tax due based on the admission figures contained in Finding of Fact "12".

E. Petitioners claim that all penalties assessed against them should be waived based upon their good faith reliance upon professional advice. In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's efforts to ascertain the proper tax liability (Northern States Contracting Co., Tax Appeals Tribunal, February 6, 1992). The mere assertion of reliance on the advice of an accountant or other tax professional is not in itself a basis for waiving penalties imposed under section 1145 of the Tax Law (Matter of Shukry v. Tax Appeals Tribunal, *supra*). If it were, few taxpayers would be subject to the penalty. Petitioners did not offer evidence of the efforts made by them or by their accountant to determine whether admission fees to a flea market are subject to sales tax -- what legal authority was consulted, what sales tax publications were reviewed, whose opinion was sought. Absent such evidence, there is no basis for waiving penalties.

F. The petitions of Antique World, Inc., Donald A. Alessi and Louis A. Berrafato are granted to the extent indicated in Conclusion of Law "D"; the notices of determination shall be modified accordingly; and in all other respects, the petitions are denied.

DATED: Troy, New York
April 13, 1995

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE